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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PEDRO PEREZ et al., Plaintiffs and Appellants, v. PACIFIC RIM TRANSPORT, INC., Defendant and Respondent.	B212594 (Los Angeles County Super. Ct. No. BC292969)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Reversed.

Law Offices of Stephen Glick, Stephen Glick; Daniels, Fine, Israel, Schonbuch & Lebovits, Paul R. Fine and Scott A. Brooks for Plaintiffs and Appellants.

Morgan, Lewis & Bockius, George A. Stohner, Barbara A. Fitzgerald and Albert Y. Huang for Defendant and Respondent.

This is an action alleging violations of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.) predicated on alleged violations of the Insurance Code and Labor Code. The trial court resolved the causes of action implicating the Labor Code by an order granting defendant's motion for summary adjudication of issues (SAI); the court resolved the causes of action involving the Insurance Code by an order granting a motion for judgment on the pleadings (JOP) without leave to amend. The current appeal is taken from a final judgment incorporating both rulings. We reverse the judgment.

FACTS AND PROCEDURAL HISTORY

Pacific Rim Transport, Inc. (PRTI)[1] operated a business that transported clients' cargo into and out of the Ports of Los Angeles/Long Beach and San Diego. PRTI did not own any trucks. Instead, it entered into written agreements with the "owner-operators" of trucks which provided that an owner-operator would lease a truck to PRTI, and that PRTI would pay the owner-operator for making deliveries of cargo, using PRTI's ostensibly leased truck, to destinations designated by PRTI. The lease agreements provided that the owner-operator of a truck, as the lessor, would pay the costs of maintaining and operating the leased truck, including the cost of liability insurance.[2]

In January 1999, Pedro Perez executed a fill-in-the-blanks, 30-day, automatically renewable lease agreement with PRTI. The basic terms of the agreement were in line with the business model described above: Perez agreed to lease his tractor trailer to PRTI, and PRTI agreed to pay Perez based on deliveries of property he made, using PRTI's leased truck, to destinations specified by PRTI.

In March 2003, Perez filed a class action complaint against PRTI. Perez's original complaint alleged two causes of action. The first alleged a violation of the UCL based on alleged violations of Insurance Code sections 35, 1631, 1633, and 1733, or, in colloquial

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[1] Our references to PRTI include Bridge Terminal Transport, Inc., a successor entity.

[2] The format of the lease agreements was revised from time to time between 2004 and 2007. Beginning in January 2005, owner-operators no longer paid for liability or cargo insurance.

terms, for "transacting insurance without a license." The second, labeled "common count for damages," largely restated Perez's claim that PRTI was transacting insurance without a license. Perez's complaint alleged that PRTI had sold liability insurance policies, issued by third party insurers, to the owner-operators of trucks with whom it had entered lease agreements. Further, that it deducted money from the earnings due to the owner-operators to be used for purchasing the insurance policies, and that the amount deducted by PRTI to purchase the insurance policies exceeded the amount that PRTI had actually paid over to the insurers. As a result, PRTI made commissions on the insurance policies that it sold to the owner-operators.

In June 2007, the trial court certified a class of 587 owner-operators described as follows: "All persons and entities in California that provided trucking services, including the transport of cargo and freight, for [PRTI] from March 28, 1999 through the present, and who had money deducted from their earnings by [PRTI] to pay for insurance coverage, obtained by [PRTI], for those persons and entities."

Perez filed a first amended complaint adding two new causes of action to his lawsuit. The added third cause of action alleged Perez was an employee and that PRTI failed to indemnify him for liability insurance, in violation of Labor Code sections 2802 and 2804. The added fourth cause of action alleged that PRTI had violated the UCL based on the alleged violation of the Labor Code.[3]

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[3] In August 2007, Division One of our court had published an opinion in which it ruled that a class comprised of Federal Express "independent contractor" drivers had presented evidence *at trial* establishing that they were, factually and legally, "employee" drivers as defined by the Labor Code section 2802, and that, as employees, they were entitled under section 2802 to be indemnified for expenditures incurred in discharging their job duties. (See *Estrada v. FedEx Ground Package System, Inc*. (2007) 154 Cal.App.4th 1 (*Estrada*).) In March 2008, Perez filed a motion to certify a "subclass" encompassing his third and fourth causes of action. The trial court did not rule on this motion prior to addressing PRTI's motions for SAI and JOP. Perez's arguments on appeal do not involve any issues of class certification regarding his third and fourth causes of action.

The parties filed three motions for SAI. Perez filed a motion for SAI of his first cause of action alleging PRTI had violated the UCL by transacting insurance without a license in violation of the Insurance Code. PRTI filed a cross-motion for SAI of Perez's first cause of action alleging the Insurance Code issues, and for SAI of Perez's second cause of action for common count, based on the same alleged issues. Separately, PRTI filed a motion for SAI of Perez's third and fourth causes of action, alleging Perez was not an employee of the company. In conjunction with all three motions for SAI, Perez and PRTI filed a stipulation of agreed upon facts. Perez and PRTI also presented added evidence in support of respective offered facts.

The trial court entered a minute order granting Perez's motion for SAI of his first cause of action for violation of the UCL based on PRTI's violations of the Insurance Code,[4] and denied PRTI's cross-motion for SAI of Perez's first and second causes of action. In short, the court ruled that the undisputed facts, stipulated and otherwise, showed that PRTI had transacted insurance without a license.

The trial court's minute order granting Perez's motion for SAI on his claims for violation of the UCL based on violations of the Insurance Code included the following stated reasoning: "[PRTI]'s provision of liability insurance on behalf of plaintiffs through [PRTI] as part of [PRTI]'s fleet policy . . . constitute[s] the sale of insurance . . . subject to regulation under the Insurance Code. While 'not all contracts allocating risk are insurance contracts subject to statutory regulation, all insurance contracts, even if sold as a secondary or incidental facet of a transaction with another, primary commercial purpose, are regulated by the Insurance Code . . . .' [(*Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 477.)] The lease agreements used during the class period . . . demonstrate that [PRTI] contracted to lease trucks from plaintiff for freight transportation. The parties stipulated that . . . [PRTI] offered the class members the option of . . . purchasing their own individual policies of liability insurance or purchasing liability insurance through [PRTI] as part of [PRTI]'s fleet policy.

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[4] The trial court's minute order indicates it was deferring a ruling "on the amount sought in restitution in light of the parties' agreement to bifurcate liability issues."

(Stipulation of Agreed Upon Facts, Fact 17 . . . .) [PRTI] offered insurance coverage to plaintiffs . . . . [PRTI] does not present any undisputed facts that would allow the court to hold that, as a matter of law, the insurance which [PRTI] offered at the plaintiff/driver's option does not constitute the transaction of insurance . . . subject to regulation under the Insurance Code, even if the insurance is only an incidental part of a more extensive transaction. Accordingly, [PRTI] transacted insurance in violation of Insurance Code [sections] 1523 and 1631, and engaged in unlawful conduct in violation of the [UCL]."

Later, the trial court granted PRTI's motion for SAI of Perez's third and fourth causes of action. The court ruled that the undisputed evidence, stipulated and otherwise, showed that Perez was an independent contractor of PRTI.

In sum, Perez had prevailed on liability on his claim for violation for the UCL based on violations of the Insurance Code; and PRTI had prevailed on Perez's claim for indemnification of job expenditures under the Labor Code, and on Perez's parallel claim for violation of the UCL based on violation of the Labor Code.

PRTI then returned its focus to Perez's Insurance Code claims by filing a motion for JOP of his first and second causes of action. PRTI's motion for JOP challenged the sufficiency of Perez's pleading on the ground that two then-recent rulings in the Courts of Appeal had held that plaintiffs claiming a violation of the UCL based on the unlicensed sale of insurance were required by Proposition 64 to "allege they suffered injury in fact and loss of money or property because of the defendants' unlicensed status." PRTI's motion cited *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583 (*Peterson*), and *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105 (*Medina*).

Thereafter, the trial court entered a minute order memorializing its decision to grant PRTI's motion for JOP: "Plaintiffs do not have standing to sue [PRTI] under the UCL because they have failed to allege that they suffered injury in fact and loss of property as the result of PRTI's unlicensed sale of insurance. The fact that Plaintiffs were charged an amount in excess of PRTI's insurance premium does not establish that Plaintiffs suffered injury in fact; Plaintiffs fail to allege that they could have bought the

same insurance for a lower price either directly from the insurer or from a licensed agent. [(*Peterson, supra*, 164 Cal.App.4th at p. 1591.)] Further, Plaintiffs do not allege that they suffered any other loss . . . on account of PRTI's unlicensed status. [(*Medina v. Safe-Guard Products, supra*, 164 Cal.App.4th at pp. 114-115.)] [¶] . . . Because Plaintiffs' second cause of action [for common count] simply incorporates the allegations of the first cause of action, it fails for the same reasons. [¶] Leave to amend would be futile because Plaintiff and the Class Members have acknowledged that they received the benefit of their bargain (Stipulation of Agreed upon Facts, numbers 29 through 32). Restitution is improper when a plaintiff has received the benefits of their bargain. [(*Peterson, supra*, 164 Cal.App.4th at p. 1596.)]"

The trial court entered a final judgment in favor of PRTI. The judgment incorporates the court's orders granting PRTI's motion for SAI (July 2008) and granting PRTI's motion for JOP (September 2008).

Perez filed a timely notice of appeal.

DISCUSSION

I. Perez's Third and Fourth Causes of Action Involving the Labor Code

Perez contends the trial court's order granting PRTI's motion for SAI of his third and fourth causes of action — which involved the issue of his status as an independent contractor — must be reversed because the evidence presented in the context of PRTI's motion for SAI established that he "was PRTI's employee." We agree with Perez that the trial court should not have summarily adjudged him an independent contractor.

As an initial matter, we must determine whether the trial court's determination that Perez was an independent contractor, rendered in the context of PRTI's motion for SAI, is reviewable as a question of fact or law.

In addressing the independent contractor or employee determination in an action involving the Workers' Compensation Act (see Lab. Code, § 3200 et seq.), the Supreme Court set forth this rule: The determination whether a person is an independent contractor or an employee is reviewed as a question of fact when it is dependent upon the resolution of disputed evidence or inferences; it is reviewed as a question of law when the

evidence is undisputed. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*) [reviewing a judgment entered upon a trial of a petition for writ of administrative mandamus]; see also *Estrada*, *supra*, 154 Cal.App.4th at pp. 10-11 [applying substantial evidence test on appeal from a judgment entered upon a trial of claims involving Labor Code section 2802]; and *Air Couriers Internat. v. Employment Development Dept*. (2007) 150 Cal.App.4th 923, 937 [applying substantial evidence test on appeal from a judgment entered upon a trial of claims involving unemployment insurance taxes].)

Because Perez's current case comes before us in the procedural context of PRTI's motion for SAI that Perez was an independent contractor, our task is to review the trial court's ruling on PRTI's motion to determine whether Perez presented enough evidence to create a triable issue of fact on the question of his status as an independent contractor. Thus, Perez raised the bar too high on appeal by arguing that the evidence proved he "was PRTI's employee." We need only be persuaded that he presented enough evidence to create a triable issue on the issue of whether he was an independent contractor; he need not persuade us that he proved he was PRTI's employee.[5]

In light of the procedural posture presented, we will review the record with an eye toward determining whether PRTI established — as a matter of law — that Perez was an independent contractor. We will not rule on the issue whether the evidence establishes that Perez was an employee. If the undisputed evidence shows that Perez was an independent contractor, we will affirm the trial court's order granting PRTI's motion for SAI; if there is a material dispute whether Perez was an independent contractor, we will reverse the trial court's order, with directions to place the issue of whether Perez was PRTI's employee or an independent contractor on track for trial.

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[5] Perez did not file a cross-motion for SAI on his third and fourth causes of action. In the event we conclude that PRTI's motion was not well taken, it does not follow that the trial court should have or could have entered an order in Perez's favor finding that he was an employee. In other words, a denial of PRTI's motion for SAI does not mean that PRTI is precluded from defending Perez's claims at trial by showing he was an independent contractor.

"Because the Labor Code does not expressly define 'employee' for purposes of section 2802, the common law test of employment applies. [Citation.] The essence of the test is the 'control of details' — that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work — but there are a number of . . . factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or . . . without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship." (See *Estrada, supra,* 154 Cal.App.4th at pp. 10-11, citing *Borello, supra,* 48 Cal.3d at pp. 350-351; *Tieberg v. Unemployment Ins. App. Bd*. (1970) 2 Cal.3d 943, 949; *Empire Star Mines Co. v. Cal. Emp. Com*. (1946) 28 Cal.2d 33, 43-44, overruled on another ground in *People v. Sims* (1982) 32 Cal.3d 468, 480, fn. 8; and *Air Couriers Internat. v. Employment Development Dept*., *supra*, 150 Cal.App.4th at p. 933.) The parties' use of a particular label does not control, and will be ignored where the evidence of their actual conduct establishes that a different relationship exists. (*Estrada*, *supra*, at p. 11; *Borello*, *supra*, at p. 349.)

The individual factors to be considered in determining whether a person is an employee or an independent contractor " 'cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*Borello*, *supra*, 48 Cal.3d at p. 351.)

With regard to the means to accomplish the work, the undisputed evidence before us shows that Perez drove his own trucks to haul cargo loads dispatched from PRTI, and that Perez purchased his trucks without any financial assistance from PRTI. PRTI did not require that Perez purchase any specific make or year of truck. Perez paid all of the costs to maintain and service his trucks, and decided where to have his trucks serviced.

As to the manner of work, PRTI did not require that Perez work according to a set schedule of work days, or at all. Perez could decide what days he worked. On days that he did go to PRTI, Perez could decline a dispatch without being subjected to discipline. Perez could have hired other drivers to operate his trucks that he had leased to PRTI; he could have leased more than one truck to PRTI at a time. Beyond requiring Perez to keep in communication with PRTI's dispatchers, who provided him with general information regarding the physical location and destination of any available hauls, Perez's agreement with PRTI did not subject him to PRTI's supervision. PRTI did not instruct Perez how to complete any particular cargo hauls and did not assign Perez to a regular route. Perez decided when, where, and for how long to take meal or rest breaks. Perez decided what clothes to wear while hauling loads for PRTI. PRTI did not require Perez to adhere to a dress code or grooming policy. The predominant requirement imposed on Perez by PRTI was that Perez perform his driving work in compliance with federal and state laws and regulations, and that he complete his work within the time required by PRTI's customers.

Were this the entire state of the evidentiary record, we would agree with PRTI that the limited control which it exercised over Perez supports a conclusion that Perez was, in fact and law, an independent contractor. However, there is more evidence disclosed in the record than that which PRTI cites and upon which it relies. We believe this additional evidence trumps PRTI's attempt to show as a matter of law that Perez was an independent contractor.

It is undisputed that PRTI executed a collective bargaining agreement (CBA) with the Teamsters Union, and that the union represented the owner-operators of trucks in the role of "employees" of the company. It is undisputed that PRTI issued a W-2 to Perez in 1999, showing federal and state income tax withheld for the year, as well as Social Security tax withheld for the year. It is undisputed that PRTI had issued the weekly checks to Perez which reflected deductions of federal and state income taxes withheld, and for state disability insurance. It is undisputed that PRTI paid health plan benefits to Perez and other owner-operators covered by the company's CBA with the Teamsters

Union, including paying 70 percent of Perez's medical and dental insurance.[6] It is undisputed that Perez was entitled to benefits based on the seniority of his relationship with PRTI. There is no dispute that PRTI paid owner-operators for specified parts of their work day not directly involving hauling shipments, such as time waiting at PRTI's customer's facilities, time spent being at a scale, and time spent at driver meetings.

Perez argues that, given the evidence in favor of his status as an employee, there is little significance to the fact that he selected the routes along which to drive when hauling cargo for PRTI. He argues his "menial decision making" in choosing one particular route or another to accomplish a particular delivery should not be enough to make him an independent contractor. Perez may or may not be correct, but we need not resolve the point in the context of reviewing a motion for SAI. The trial court's order granting SAI must be reversed because a reasonable trier of fact, sitting in judgment of the totality of the evidence, could reasonably conclude that Perez was in fact an employee of PRTI. This case presents the situation where competing, not necessarily conflicting, evidence of the relevant factors to be considered cannot be applied mechanically, but must be weighed depending upon the particular combination presented. (*Borello*, *supra*, 48 Cal.3d at p. 351.)

Although PRTI's lack of control over the day-to-day details of Perez's work is different in kind and quantity from the circumstances supporting the "employee" finding at trial in *Estrada*,[7] we decline to find that the circumstances in this case are such that no

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[6] For its part, PRTI maintained that "Perez and the other owner-operators did not receive benefits from PRTI that are typically provided to employees [such as] paid vacation, paid holidays, bonuses, pension benefits, 401(k) benefits, or long-term disability." In PRTI's words: "If Perez did not work, he was not paid." How that is different from the situation for many employees, PRTI does not explain.

[7] In *Estrada*, FedEx had control over "every exquisite detail" of the drivers' day-to-day tasks, including requirements regarding uniforms, the color of their socks, hairstyle, and the types of trucks and scanners to be used. (*Estrada*, *supra*, 154 Cal.App.4th at pp. 11-12.) The evidence in *Estrada* further showed that FedEx managers could unilaterally reconfigure a driver's route without regard to any loss of income, and that

reasonable trier of fact could find "control" to have existed in the relationship between PRTI and Perez.

On a final note, we are not persuaded by Perez's argument that his status as an independent contractor is necessarily defeated by evidence of the CBA between PRTI and the Teamsters Union.[8] First, as noted above, the label "employee" used in the CBA is not dispositive. (*Borello, supra*, 48 Cal.3d at p. 349.) Second, the CBA did not prescribe highly specific rules governing Perez's work. Essentially, the CBA provided that a union owner-operator would be available for dispatch at the start of each day, that dispatches would be meted out in order of "seniority," and that an owner-operator would confirm with PRTI when a haul was completed. Although the CBA stated that an owner-operator could not refuse a dispatch, the evidence showed that the actual practice was that an owner-operator who declined a dispatch from PRTI would not be disciplined, but rather, would simply be put to the back of the line.[9]

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drivers needed to arrive for the job at regular times for assigned tasks such as sorting and packing, as well as attend mandatory meetings.

[8] Article I, section A, of the CBA provides: "This Agreement covers the movement of intermodal traffic into and out of the waterfront of the Ports of Los Angeles/Long Beach and San Diego. This Agreement governs the use of 'owner/operators' (as that term is defined below) who are domiciled in Los Angeles/Long Beach, San Bernardino, and San Diego. The parties recognize that there are two distinct types of 'Owner/Operators.' Employee owner/operators are drivers who work exclusively for a single Employer on a regular basis and whose manner, means and details of work are determined by the Employer as well as the ends of work to be accomplished, and Independent Contractor Owner Operators, and it is only that kind of owner/operators who do hauling work on a[n] intermittent basis for different Employers. The latter may be utilized to perform work, which may be properly subcontracted under Article 15 [of this Agreement]." Article I, section C, of the CBA provides: "All employee owner/operators shall be subject to the provisions of this Agreement. Employee owner/operators shall work exclusively for their Employer and for no other interests."

[9] Perez's reliance on the CBA as "binding" evidence in support of his status as a PRTI employee is otherwise interesting because article 12, section A, of the CBA provides: "The employees shall pay all operating expenses and taxes including all mileage, taxes, fuel taxes, gross receipts taxes, personal property taxes, *public liability insurance, property damage insurance and cargo insurances*. . . ." (Italics added.) In

Accordingly, we reverse the trial court's decision to grant PRTI's motion for SAI because we have been persuaded by Perez's arguments on appeal that the trial court erred when it ruled, as a matter of law, that Perez was PRTI's independent contractor. We make no finding that Perez was an employee of PRTI.

II. The First and Second Causes of Action Based on the Insurance Code

Perez contends the trial court abused its discretion in denying him leave to file an amended complaint when it granted PRTI's motion for JOP. We agree.

The standard of review applied to a trial court's order granting a motion for JOP is the same as that applied in the context of a general demurrer. Accordingly, we must treat Perez's pleading as admitting all of the material facts properly pleaded and disregard its contentions, deductions and conclusions of law. We examine the pleading de novo to determine whether it alleges facts sufficient to state a cause of action under any theory. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) We review the trial court's denial of leave to amend for an abuse of discretion. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.) A trial court abuses its discretion in this context when the record persuades that there is a reasonable possibility that the defect in a pleading can be cured by amendment. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Before directly addressing Perez's arguments regarding his first and second causes of action, we consider the impact of Proposition 64, which the voters of California approved in November 2004. Proposition 64 amended the UCL to provide that a plaintiff has standing to sue under the UCL only when he or she "has suffered injury in fact and has lost money or property as a result of unfair competition." (See Bus. & Prof. Code, §§ 17203, 17204.) Prior to Proposition 64, anyone acting for the general public had standing to sue for relief under the UCL, even when he or she had not suffered any

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other words, Perez appears to want PRTI bound to an employer-employee relationship by virtue of the use of the word "employee" in the CBA, but, at the same time, Perez wants the express terms of the CBA to be unenforceable insofar as insurance costs are concerned.

injury. (See, e.g., *Stop Youth Addiction, Inc. v. Lucky Stores, Inc*. (1998) 17 Cal.4th 553, 561.) The change wrought by Proposition 64 was intended to disallow private UCL lawsuits when no one actually has been harmed by a defendant's acts. (See Historical and Statutory Notes, 4D West's Ann. Bus. & Prof. Code (2008 ed.) foll. § 17203, p. 409.) Proposition 64's standing requirement is applicable to UCL actions filed before the change in the law took effect. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223.)

In the trial court, and on appeal, Perez and PRTI considered the legal issue presented by the PRTI's motion for JOP as whether Perez stated a cause of action under *Peterson, supra*, 164 Cal.App.4th 1583, and *Medina, supra*, 164 Cal.App.4th 105. The trial court agreed with PRTI's position that *Peterson* and *Medina* established a pleading requirement. It determined that in a UCL action based on violations of the Insurance Code that a plaintiff must allege actual injury. It must be alleged, for example, that a plaintiff paid an expense added to the cost of purchasing insurance which would not otherwise have been incurred, or that insurance coverage was unavailable to cover a claim that plaintiff reasonably expected would be an insured loss at the time he or she bought the policy. In other words, where a person knows the insurance that he or she is buying includes a fee or commission, and he or she gets the insurance coverage for which he or she paid, the plaintiff suffers no injury under the UCL and Proposition 64.

In Perez's current case, the court examined Perez's pleading and ruled that it did not allege facts showing he had actually suffered some harm from PRTI's transaction of insurance without a license. On appeal, Perez maintains that his pleading was sufficient under Proposition 64. Alternatively, and more strongly, he contends he should be granted leave to amend to allege a UCL cause of action based on violation of the Insurance Code in accord with the reasoning and result found in *Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305 (*Troyk*). Perez's argument is well-taken.

Troyk involved a UCL class action against Farmers by a group of plaintiffs who alleged the insurer charged an administrative service fee for securing automobile liability insurance, without disclosing that the fee was part of the insurance premium. Plaintiffs

alleged that the hidden fee violated disclosure requirements prescribed by Insurance Code section 381, subdivision (f). (*Troyk, supra*, 171 Cal.App.4th at pp. 1314, 1347.) In an initial part of its opinion, the *Troyk* court interpreted the term "premium" as it is used in section 381, subdivision (f), to include any service fee imposed on a payment of a stated premium for an insurance policy. (*Troyk*, at pp. 1315, 1333.) This meant, concluded *Troyk*, that a service fee must be disclosed in an express statement in the policy itself. (*Id*. at p. 1333.)

Troyk then turned to Proposition 64's requirement that a plaintiff allege injury in fact. It is this part of *Troyk* which is instructive. It determined: "Applying that standard for 'injury in fact' to the circumstances in this case, we conclude [plaintiff] has alleged an 'injury in fact' for purposes of [the UCL]. The complaint alleges he and the other class members paid monthly service charges that were not disclosed as premium in violation of [Insurance Code] section 381, subdivision (f), and that Farmers wrongfully required them to pay, and that actual payment of money (i.e., monthly service charges) by [plaintiff], as wrongfully required by Farmers, constituted an 'injury in fact' for purposes of [the UCL]." (*Troyk, supra*, 171 Cal.App.4th at p. 1347.) As to the element of "causation," *Troyk* held that it was enough for UCL standing purposes for a plaintiff to allege that he or she would not have paid, or not have agreed to pay, the monthly service fee had the fees been properly disclosed as premium in the insurance policy as required by section 381, subdivision (f). (*Troyk*, at p. 1349.)

We are satisfied that there is a reasonable possibility that Perez will be able to allege "*Troyk*" facts supporting a cause of action against PRTI for violation of the UCL based on violations of the Insurance Code. Perez's current pleading alleges that PRTI charged an amount for the liability insurance that it sold to Perez which was in excess of the amount that PRTI actually paid for the insurance. Perez offers to amend his complaint to add the allegation that had PRTI complied with the Insurance Code, it would have been required to make additional disclosures regarding the money that PRTI was taking from the owner-operators. Such failure to disclose caused the owner-operators to lose money by paying an overcharge they had not agreed to pay, and would

not have paid. We note in passing, as a matter of proof at the time of trial, that Perez's claim may fail upon evidence showing that by purchasing insurance through PRTI, at PRTI's fleet prices, the owner-operators' purchase costs were lower, even taking into consideration PRTI's profits. That eventuality, however, assuming it was proven, does not defeat Perez's pleading arguments.

Given *Troyk*, and paragraphs 14 and 34 in Perez's current complaint, we find there is a reasonable possibility that Perez can allege that he paid more to PRTI than the cost of insurance otherwise available. Unlike *Peterson*, where the plaintiff only paid the *actual* cost of the insurance premium, and it was the insurer who suffered the economic loss as the defendant collected an unlawful commission from the insurer, not from the consumer (*Peterson, supra*, 164 Cal.App.4th at p. 1586), in Perez's current case, he should be permitted to attempt to allege that he paid too much for the insurance because he was paying an added cost that went into PRTI's pockets.

DISPOSITION

The judgment is reversed. The cause is remanded to the trial court with directions to vacate its orders granting PRTI's motion for SAI and granting PRTI's motion for JOP without leave to amend, and to enter new and different orders denying PRTI's motion for SAI and granting PRTI's motion for JOP with leave to amend. Appellants are awarded costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J. GRIMES, J.